

2006

Express Recovery Services Inc., a Debt Collection Agency v. Adam Shewell : Brief of Appellee

Utah Court of Appeals

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**EXPRESS RECOVERY
SERVICES INC., a Debt Collection
Agency,**

Plaintiff/Appellant,

VS.

ADAM SHEWELL,

Defendant/Appellee.

Case No. 20060576-CA

District Court No. 050408082

BRIEF OF APPELLEE EXPRESS RECOVERY SERVICES, INC.

**APPEAL FROM THE THIRD DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH,
JUDGE TERRY CHRISIANSEN**

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FILED
UTAH APPELLATE COURTS
OCT 10 2006

LIST OF ALL PARTIES

Appellant - Express Recovery Services Inc.

Appellee - Adam Shewell

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to *Utah Code Ann.* § 78-2a-3(2) as this is an appeal of a final order of the Third District Court.

STATEMENT OF THE ISSUES RAISED ON APPEAL

APPELLANT’S ISSUE NO. 1: Did the district court err in its refusal to award collection costs and attorney fees where the contract specifically provided for both?

STANDARD OF REVIEW FOR ISSUE NO. 1: This is an issue of law as the facts are undisputed. It involves basic common law contract law and enforcing the four corners of a contract. This Court reviews issues of law for correctness and no deference need be given the lower court. *MacKay v. Hardy*, 973 P.2d 941, 944 (Utah 1998).

PRESERVATION OF ISSUE NO. 1: Order Denying Collection Costs entered by the lower court.

APPELLANT’S ISSUE NO. 2: Did the district court invade the province of the legislature when it adopted four requirements in a detailed affidavit setting forth all collection costs incurred instead of simply allowing the percentage for the collection agency fee as set forth in the contract?

STANDARD OF REVIEW FOR ISSUE NO. 2: This is an issue of law and is subject of the correctness standard of review. *MacKay v. Hardy*, 973 P.2d 941, 944 (Utah 1998).

PRESERVATION OF ISSUE NO. 2: Order Denying Collection Costs entered by the lower court.

APPELLANT’S ISSUE NO. 3: Did the district court err by not finding persuasive authority in the bad check statute or sister state opinions that specifically allow collection costs, attorney fees and damages to make a creditor whole.

STANDARD OF REVIEW FOR ISSUE NO. 3: This is an issue of law and is subject to the correctness standard of review. *MacKay v. Hardy*, 973 P.2d 941, 944 (Utah 1998).

PRESERVATION OF ISSUE NO. 3: Order Denying Collection Costs entered by the lower court.

CONSTITUTIONAL PROVISIONS AND STATUTES

DETERMINATIVE OF APPEAL

Utah Code Ann. § 7-1-15 et seq, the bad check statute, though not directly on point, is persuasive authority that the legislature has provided for attorney fees and collection cost as damages that should be recovered by a creditor.

STATEMENT OF CASE

NATURE OF THE CASE

Express Recovery Services brought this contract action against Adam Shewell (Shewell), for failure to pay medical services to Plaintiff’s assignor Dr. Zimmerman. Judgment was obtained however the district court refused to allow collection costs as specifically provided for in the contract. The Court adopted a requirement that if the contract provides for attorney fees and collection costs, an affidavit setting forth all

collection costs must be submitted for the Court to consider an award of those costs.

Plaintiff appeals from the Court's order.

COURSE OF PROCEEDINGS

The case was filed by Plaintiff in 2005 seeking judgment against Shewell pursuant to a signed contract for medical services with Dr. Zimmerman. Shewell failed to file a timely answer and default judgment was sought. The district court in a default rejection notice, stated it would not allow collection costs and attorney fees. Plaintiff requested a hearing on the matter and subsequently the district court judges in West Jordan adopted a four requirement detailed affidavit if a creditor sought an award of both attorney fees and collection costs.

DISPOSITION IN COURT BELOW

The trial court issued an Order Denying Collection Costs stating that the West Jordan judges adopted a four requirement detailed affidavit for creditors seeking an award of both attorney fees and collection costs. The court held that without such a detailed Affidavit it was unable to determine the reasonableness of the collection costs sought to be recovered. The court further added that seeking a percentage of the principal amount owing as collection costs is "akin to seeking liquidated damages", and liquidated damages must have some reasonable relationship to the actual damages. Therefore the court denied Plaintiff's request for collection costs based on a set percentage.

STATEMENT OF FACTS

The facts germane to this appeal are not in dispute.

1. Shewell signed a contract for medical services with Dr. Zimmerman. See

ADDENDUM Exhibit "A" the contract. The contract specifically provides in relevant part:

In consideration of treatment by Doctor, the undersigned agrees:

1. To pay the amount charged by the doctor for all professional treatment and services to the undersigned, his or her family, or to the patient indicated above.
2. Your full account is due and payable within 30 days of the closing date of your monthly statement REGARDLESS of insurance involvement. Amounts not paid by this time will be considered delinquent and a finance charge of 1 ½% per month (annual percentage rate 18%) will be made.
3. To pay all costs of collection including a 50% collection agency commission, reasonable attorney fees, and interest at a rate of 21% per annum. I also agree to submit myself to the jurisdiction of Salt Lake County, Utah.

3. Shewell failed to honor the terms of the contract and a summons and complaint was served on August 16, 2005. ® - 1-9)

4. Defendant failed to answer and Plaintiff sought default judgment according to the terms of the contract. ® - 18.)

5. On September 28, 2005, the trial court sent a default rejection notice stating that plaintiff cannot collect attorney fees and collection costs. ® - 27).

6. Plaintiff requested a hearing on the matter and on November 10, 2005, the court reiterated its position that Plaintiff cannot collect both attorney fees and collection costs.

7. The trial court issued a memorandum dated December 1, 2005 relating to collection costs as a percentage of the debt and attorney fees. See ADDENDUM Exhibit “B” “Memorandum”, attached hereto and incorporated by reference herein.

8. The trial court adopted four requirements for a creditor to recover collection costs:

- (1) The costs must be specifically provided for by statute or contract;
- (2) The costs must be reasonable;
- (3) The costs must be actually incurred by the creditor; and
- (4) The collection costs sought must be verified by the creditor in a detailed Affidavit setting forth the itemized costs sought to be recovered , that such costs were actually incurred and attaching that portion of the contract or statute which provides for recovery of collection costs.

9. On April 6, 2006 the court issued its Order Denying Collection Costs. See ADDENDUM Exhibit “C” attached hereto and incorporated by reference herein.

10. Plaintiff appeals that Order.

SUMMARY OF ARGUMENT

Shewell signed a contract with Dr. Zimmerman that specifically provided for collection costs and attorney fees. The trial court, in denying collection costs and attorney fees has stepped in and reformed the contract voluntarily entered into between the parties.

The trial court, in adopting its own requirements for considering collection costs and attorney fees has invaded the province of the legislature and/or unilaterally modified a written contract between the parties and therefore should be overturned.

ARGUMENT

I. THE DISTRICT COURT WAS INCORRECT IN ITS REFUSAL TO AWARD COLLECTION COSTS AND ATTORNEY FEES WHERE THE CONTRACT SPECIFICALLY PROVIDED BOTH .

The contract entered into voluntarily between Shewell and Dr. Zimmerman specifically provided for collection costs and attorney fees. It did not say that collection costs had to be set forth with specificity in the form of an affidavit. It simply stated that if Shewell failed to pay his account timely that he agrees to pay a “50% collection agency commission [and] reasonable attorney fees.” Shewell could have easily avoided the additional costs by simply paying his bill.

Shewell failed to answer Plaintiff’s complaint and a default judgment was entered. Shewell never objected to the collection agency commission. The trial court, on its own accord, stepped in and in effect re-wrote the terms of the contract. This is not the duty of the courts. Parties are free to enter into any contract with any terms. Shewell could simply have gone to another medical provider who presented a different contract if he had any objection to the terms. There is no evidence of fraud or duress.

In *Brixen & Christopher Architects v. Elton*, 777 P.2d 1039 (Utah 1989) the Court held that a “contract should be construed according to its plain language.” (Citing *Crowther*

v. Carter, 767 P.2d 1039 (Utah Ct.App.1989)). Even if the Court does not agree with the terms of the contract, it is not empowered to change its terms. *Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107, 110 (Utah Ct.App.1990). The *Heiner* court held:

we will not rewrite an agreement to relieve a party from a bad bargain. It is a long-standing rule in Utah law that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the Courts to relieve either party from the effects of a bad bargain. *Id.* at 110. (Quoting *Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743, 749 (Utah 1982).

It is well settled Utah law that when interpreting a contract the court should look within the four corners of the contract. Therefore, the trial court was in error when it looked beyond the four corners and in effect re-wrote the contract for the parties.

II. THE DISTRICT COURT INVADED THE PROVINCE OF THE LEGISLATURE WHEN IT ADOPTED A REQUIREMENT OF A DETAILED AFFIDAVIT SETTING FORTH ALL COLLECTION COSTS INCURRED INSTEAD OF SIMPLY ALLOWING THE PERCENTAGE RATE OF COLLECTION AGENCY FEE AS SET FORTH IN THE CONTRACT.

The trial court issued a memorandum dated December 1, 2005 relating to collection costs as a percentage of the debt and attorney fees. See Exhibit "B" "Memorandum", attached hereto and incorporated by reference herein. The trial court adopted four requirements for a creditor to recover collection costs:

- (1) The costs must be specifically provided for by statute or contract;
- (2) The costs must be reasonable;
- (3) The costs must be actually incurred by the creditor; and

- (4) The collection costs sought must be verified by the creditor in a detailed Affidavit setting forth the itemized costs sought to be recovered , that such costs were actually incurred and attaching that portion of the contract or statute which provides for recovery of collection costs.

The trial court, in adopting the new requirements, has usurped the authority of the legislature. Plaintiff has been unable to find any provision giving the trial court authority to make substantive changes to well settled contract law. Local courts are given authority to adopt local supplemental rules pursuant to Rule 2.204 Rule of Judicial Administration. However, the local rules are limited to the administration of the court. These four requirements clearly go well beyond the administration of the court and invade the province of the legislature. See *I.M.L. v. State*, 2002 UT 110, ¶ 29; 61 P.3d 1038, 1048 (refusing to read “actual malice” into statute without such language because doing so would invade the province of the legislature) (citations omitted).

The district court judges in West Jordan do not want to enforce a contract according to its terms. Plaintiff understands their desire to protect debtors, however, no legal support for their new requirements can be found. Also, the District Court fails to acknowledge that the “collection cost” represents the collection agency commission and is an actual cost to the original creditor. The contract language allows the original creditor to recoup that cost. The District Court’s ruling requires an original creditor to chose between recovering the fee of a retained collection agency or attorney’s fees incurred to file suit to recover the claim. By forcing this decision, the original creditor is prohibited from being made whole. No case on point was found in Utah however, in Arizona a case directly on point was found. In *Grant*

Road Lumber Co., Inc. v. Wystrach, 140 Ariz. 479; 682 P.2d 1146 (1984), the Arizona Court of Appeals had similar concerns expressed by the West Jordan judges.

The Arizona court held that the payment of collection costs by the client to a collection agency on a contingency fee basis is not prima facie reasonable. “There must be other evidence such as the reasonable amount for a contingency fee charged in the community for similar work and the reasonableness of the amount in turn collected from the debtor based upon prevailing practices in the community.” *Grant Road* at 1148. However, when the parties agree in advance to a certain percentage, “**no other evidence is necessary**” *Id.* (emphasis added). This is the case here. Shewell and Dr. Zimmerman agreed in advance that should the account become delinquent and turned over to collections, Shewell agreed to pay a certain percentage for collection costs. The Arizona court correctly did not entertain any discussion as to a liquidated damage provision. This case is not akin to a liquidated damage case. There is no “penalty” here. The lower court is not obligated to protect the interests of all parties. It is to enforce the terms of a contract.

“A party claiming unconscionability bears a heavy burden. The law enables parties to freely contract, establishing terms and allocating risks between them. The law even permits parties to enter into unreasonable contracts or contracts leading to a hardship on one party.” *Ryan v. Dan’s Foods*, 972 P.2d 395 (Utah 1998) Unconscionability has been defined as an absence of meaningful choice together with terms that are unreasonably favorable to the other party. *Resource Management Co. v. Weston Ranch*, 706 P.2d 1028

(Utah 1985) Clearly, the present case does not meet the definition of unconscionable, in that defendant had a “meaningful choice” nor is there any evidence that the collection agency fee is unreasonable.

III. THE LEGISLATURE HAS PREVIOUSLY RECOGNIZED THE NECESSITY OF ALLOWING COLLECTION COSTS, ATTORNEY FEES AND DAMAGES TO MAKE A CREDITOR WHOLE

The legislature enacted a return check statute that specifically allows for the recovery of collection costs, attorney fees and treble damages. See *Utah Code Ann. § 7-15-1 et seq.* In doing so, the legislature recognized that it was appropriate to consider all three elements of damages to make the creditor whole. They understood that by the time suit was filed to recover monies owed on a bad check, several parties were involved and that each party should be compensated for time and effort.

The statute provides that the original creditor is entitled to recover the original amount of the check, interest, and treble damages. The original creditor is the only party entitled to the treble damages and no division of those funds is permitted. The statute further provides for a service fee and a collection cost as additional elements of damages. It is customary practice for the collection agency to retain the collection fee and the service fee, although it is not necessary for a collection agency to be involved in order for the holder of the check to recover those fees.

Finally, the legislature understood that creditors may need to hire attorneys to file suit to recover monies owed on a bad check. Therefore, the legislature provided for attorney fees

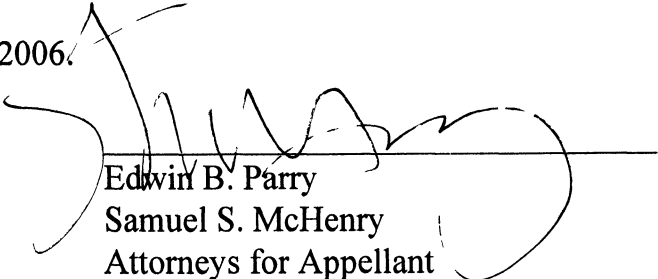
in addition to damages, collection costs and service fees. The legislature felt all of these damages, costs, and fees were necessary to compensate the creditor under the statute.

The bad check statute clearly supports Plaintiff's preposition that a medical provider should be able to recover all of its costs incurred in the collection of a bad debt. Just as the case under the bad check, the original creditor incurs additional costs by paying the collection agency a commission to collect the debt. Dr. Zimmerman and Shewell freely contracted for the costs of collection and attorney fees in the event of a delinquent account. The parties specifically set a percentage amount in the contract and there was no evidence that the amount claimed is unreasonable. Therefore, the terms of the contract should be enforced.

CONCLUSION

The trial court's Order denying collection costs and attorney fees should be reversed, its adoption of the four requirements should be held to invade the province of the legislature and be held invalid, and the contract should be allowed to stand within its four corners.

DATED this 10 day of October, 2006.



Edwin B. Parry
Samuel S. McHenry
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of October, 2006, I caused to be mailed via U.S. Mail, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLANT EXPRESS RECOVERY SERVICES** to the following:

ADAM SHEWELL
5590 Edgewood Drive
Holladay, Utah 84117

A handwritten signature in black ink, appearing to be 'AS', is written over a horizontal line.

ADDENDUM

Exhibit A- Contract between Adam Shewell and Dr. Zimmerman

Exhibit B- Memorandum

Exhibit C- Order Denying Collection Cost

EXHIBIT A

Patient's Name: **Adam Shewell**

HEALTH QUESTIONNAIRE ACKNOWLEDGEMENT AND CONSENT TO PROCEED:

I certify that the answers to the health questions are accurate and correct to the best of my knowledge. Since a change of medical condition or medications can affect dental treatment, I understand the importance of and agree to notify the dentist of any changes at any subsequent appointment.

I authorize Dr. Zimmermann and/or such associates or assistants as he may designate to perform those procedures as may be deemed necessary or advisable to maintain my dental health or the dental health of any minor or other individual for which I have responsibility, including arrangement and/or administration of any sedative (including nitrous oxide), analgesic, therapeutic, and/or other pharmaceutical agent(s), including those related to restorative, palliative, therapeutic or surgical treatments.

I understand that the administration of local anesthetic may cause an untoward reaction or side effects, which may include, but are not limited to bruising, hematoma, cardiac stimulation, temporary or, rarely, permanent numbness, and muscle soreness. I understand that occasionally needles break and may require surgical retrieval.

I understand that as part of dental treatment, including preventive procedures such as cleanings and basic dentistry, including fillings of all types, teeth may remain sensitive or even possibly quite painful both during and after completion of treatment. Gums and surrounding tissues may also be sensitive or painful during and/or after treatment.

I do voluntarily assume any and all possible risks, including the risk of substantial and serious harm, if any, which may be associated with general preventive and operative treatment procedures in hopes of obtaining the potential desired results, which may or may not be achieved, for my benefit or the benefit of my minor child or ward. I acknowledge that the nature and purpose of the foregoing procedures have been explained to me if necessary and I have been given the opportunity to ask questions.

In consideration of treatment by Doctor, the undersigned agrees:

1. To pay the amount charged by the doctor for all professional treatment and services to the undersigned, his or her family, or to the patient indicated above.
2. Your full account is due and payable within 30 days of the closing date of your monthly statement REGARDLESS of insurance involvement. Amounts not paid by this time will be considered delinquent and a finance charge of 1 1/2% per month (annual percentage rate 18%) will be made.

3. To pay all costs of collection including a 50% collection agency commission, reasonable attorney fees, and interest at a rate of 21% per annum. I also agree to submit myself to the jurisdiction of Salt Lake County, Utah.

Signature: _____

Date

6-10-04

Witness: _____

Tanya Adams

Date

6-10-04


EXHIBIT B

MEMORANDUM

To: Collection Attorneys and Litigants
From: Third District Court West Jordan
Date: December 1, 2005
Subject: Policy on Collection Costs

A number of cases have recently come before the West Jordan District Court raising the issue of whether collection costs are recoverable by a creditor and, if so, to what extent. Particularly troubling are cases when the creditor seeks to recover both costs of collection as a percentage of the debt and attorney fees. As Judges we feel an obligation to ensure that a creditor not suffer a loss in order to collect a debt where recovery of collection costs are agreed upon by contract or are allowed by statute. On the other hand, a debtor should not suffer a "penalty" beyond what is owed plus interest, attorney fees and reasonably incurred collection costs. To balance the legitimate concerns of both debtors and creditors, the undersigned enact the following requirements for a creditor to recover collection costs:

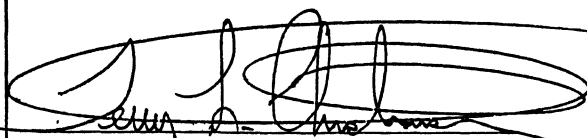
1. The costs must be specifically provided for by statute or contract;
2. The costs must be "reasonable";
3. The costs must be actually incurred by the creditor;
4. The collection costs sought must be verified by the creditor in a detailed Affidavit setting forth the itemized costs sought to be recovered, that such costs were actually incurred and attaching that portion of the contract or statute which provides for recovery of collection costs.




Judge Robert W. Adkins



Judge Pat B. Brian



Judge Terry L. Christiansen



Judge Royal Hansen

EXHIBIT C

IN THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

EXPRESS RECOVERY SERVICES INC,
(a Debt Collection Agency)

Plaintiff,

vs.

ADAM SHEWELL

Defendant,

:
:
:
:
:
:
:

ORDER DENYING COLLECTION COSTS

Honorable Terry Christiansen

CASE # 050408082

Before the Court is Plaintiff's Motion to Reconsider awarding both collection costs and attorney fees. Plaintiff's counsel specifically challenges the fourth requirement of the West Jordan Collection Policy that any request for collection costs must be accompanied by an Affidavit setting forth the itemized costs actually incurred.

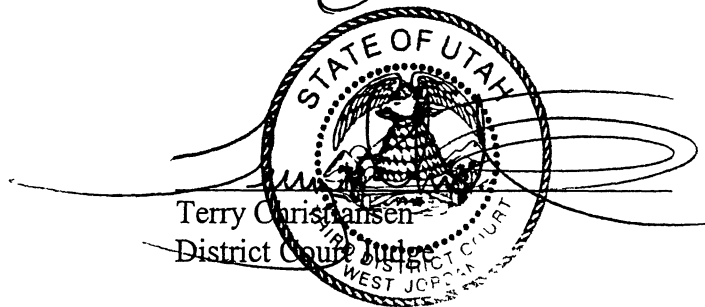
On December 1, 2005, the West Jordan Judges adopted a policy requiring that where there is a contract providing for collection costs of a certain percentage that an affidavit be filed setting forth with specificity the collection costs actually incurred. For example, if Plaintiff incurred expense for skip tracing, phone calls, correspondence, negotiations with the debtor, etc. then the Affidavit needs to set forth the services rendered and the expense incurred for each service rendered. Such costs are not to be part of the attorney fees that are allowed and awarded either under Rule 73 or by Affidavit. Without such a detailed Affidavit the Court is simply unable to determine the reasonableness of the collection costs sought to be recovered. Seeking a percentage of the principle amount owing as collection costs is akin to seeking liquidated damages. It is well established that a liquidated damage provision in a contract must have some reasonable relationship to the actual damages. Similarly , the amount of collection costs, to be

reasonable, must be tied to the amount of collection costs actually incurred.

The West Jordan judges are aware that the Affidavit required will to a certain extent place a burden on Plaintiff's. However, the Courts are obligated to protect the interest of all parties and a debtor should not suffer a "penalty" beyond what is owed plus the legitimate factors of interest, attorney fees and justifiable and justified collection costs.

Accordingly, Plaintiff's Motion to Reconsider be, and the same hereby is, denied.


Dated this 6 day of April, 2006



MAILING CERTIFICATE

I certify that I mailed a true and correct copy of the Order Denying Collection Costs to both parties.

Dated this 10 day of April, 2006.



Court Clerk

Plaintiff
Attorney Edwin B. Parry
3782 West 2340 South Suite B
J. Q. Adams Building
West Valley City, UT 84120

Defendant
Adam Shewell
5590 Edgewood Drive
Holladay, UT 84117